Supreme Court, U.S.
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10-726 NOV 24 2010

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No.

In the

Supreme Court of the United States

JOSEPH P. GANIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE SECOND CIRCUIT COURT OF APPEALS ERRED IN NOT GRANTING A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT'S RULING THAT DENIED THE PETITIONER'S 2255 MOTION BASED UPON A ***BRADY/GIGLIO*** VIOLATION FOR FAILURE TO DISCLOSE A TACIT AGREEMENT FOR FAVORABLE TREATMENT BETWEEN THE GOVERNMENT AND TWO COOPERATING WITNESSES.

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INTRODUCTION

Joseph P. Ganim, the Petitioner, respectfully requests that this Court grant his petition for a writ of certiorari to review the decision and judgment of the Second Circuit Court of Appeals denying the Petitioner's request for a Certificate of Appealability in the matter of *Joseph P. Ganim v The United States of America* along with the underlying District Court "*Ruling*" and "ORDER" denying the Petitioner's request for a Certificate of Appealability.

This case involves the non-disclosure of critical impeachment evidence based upon an agreement between the Government and two cooperating witnesses who were paid hundreds of thousands of dollars following their testimony for the Government at the Petitioner's trial.

These clear ***Brady/Giglio*** violations which were only discovered after the trial had concluded are violations of the Petitioner's 5th and 6th Amendment rights under the United States Constitution. The testimony of these two witnesses was the foundation of the Government's case against the Petitioner. These witnesses freely admitted to receiving hundreds of thousands of dollars in payments from the Government, but deny that these payments were part of any undisclosed -- tacit **agreement**. As a result, the District Court ruled that there was nothing to disclose during the trial because there was no express agreement and because these benefits were only paid after the petitioner's trial had concluded.

This analysis –although somewhat consistent with Second and Tenth Circuit law, is at odds with this

Court's long held rulings in both *Brady* and *Giglio*. It is also in conflict with numerous other rulings from other circuit courts on this identical issue. **There is clearly a multiple Circuit split on this very important Constitutional issue.**

The Sixth, Seventh, Eighth and Ninth Circuits have all held that this type of evidence must be disclosed. **These circuits have all held that an agreement, even if not consummated until after the petitioner's trial or even if such an agreement or understanding is not explicit –but only "tacit"—it must be disclosed. Had this evidence been disclosed the results of the petitioner's trial would have been different.**

OPINIONS BELOW

The Order from the United States Court of Appeals for the Second Circuit denying the request for a Certificate of Appealability (Kattzmann, J., joined by Hall, J., and Chin, J.) (reprinted at **APPENDIX A)** is unreported. The RULING ON PETITIONER'S MOTION TO VACATE SET ASIDE OR CORRECT SENTNECE by the District Court (J. Arterton) (reprinted at **APPENDIX B)** is unreported and the ORDER by the District Court (J. Arterton) (reprinted at **APPENDIX C)** Denying the request for a Certificate of Appealability is unreported.

JURISDICTION

The Second Circuit Court of Appeals entered its ORDER on August 26, 2010 wherein that Court DENIED the Petitioner's request for a Certificate of

Appealability and Dismissed his appeal. Jurisdiction is invoked under 28 U.S.C. sec. 1254(1)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are 28 U.S.C. § 2255; 28 U.S.C. § 1254; 28 U.S.C. § 2253(c)(1); 28 U.S.C. § 2253(c)(2); 18 U.S.C. § 1962; The 5th Amendment of the United States Constitution; The 6th Amendment of the United States Constitution, and can be found in Appendix F.

STATEMENT OF THE CASE

This case arises from the filing of a post-conviction motion for a new trial based upon newly discovered evidence which had been filed under seal and suppressed by the Government in violation of ***Brady/Giglio*** in the matter of *USA v. Joseph P. Ganim* Docket No. 3:01-cr-00263-JBA-1. It also is based upon the use of false testimony related to the undisclosed evidence offered into evidence at the Petitioner's trial in order to gain a conviction.

The Petitioner was the mayor of Bridgeport, Connecticut from 1991 through 2003. On October 31, 2001 he was indicted for political corruption. He was placed on trial in 2003. He was convicted after trial and on July 1, 2003 he was sentenced to 108 month imprisonment. From his convictions and sentence he appealed.

In 2008, following the exhaustion of all his appeals, the Petitioner discovered that the Government had

suppressed numerous documents. The Government did this by filing them under seal in each of these witnesses' separate criminal district court files. This had been done by the Government prior to the Petitioner's his trial and these documents were never disclosed to the Petitioner.

These documents containing language reflecting terms of two separate "agreements" that the Government had made with its two with key Government witnesses. These agreements provided for enormous financial benefits to these witnesses in exchange for their favorable testimony against the Petitioner at his trial. These witnesses then did testify at the Petitioners trial for the Government. They provided days of testimony for the Government without which--the Government readily concedes--they could not have obtained a conviction.

Although the Government was required to disclose all of the agreements it had with these witnesses as part of ***Brady/Giglio*** material, it did not. The Government suppressed these agreements and even allowed these same cooperating witnesses to testify falsely on direct examination about the extent of the benefits they were to receive in exchange for their testimony.

Some of the benefits that they were to receive included the forgiveness of hundreds of thousands of dollars in federal income taxes. It included the waiving by the Government of mandatory forfeiture obligations and the payment by the Government of substantial fines that were to be imposed by the Court on each of these two cooperators. These payments were made with funds that had been secretly held in

escrow, while designated to go to the Asset Forfeiture Fund of the United States Treasury Department.

These ***tacit agreements*** between the Government and the cooperating witnesses were evidenced only by documents that had been placed under seal by the Government. They remained under seal until well after the Petitioner's trial. The sealed documents were only discovered months later by the Petitioner when they were inadvertently unsealed. Once the Petitioner discovered these documents existed, he immediately filed a timely 2255 Motion in District Court.

The 2255 motion was based upon the fact that the Government had knowingly suppressed these documents from the Petitioner and his counsel, despite the fact that they contained the terms of a tacit agreement between the Government and each of these two cooperators in violation of *Brady* and *Giglio*. (See: *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *Giglio v. United States*, 405 U.S. 150, 154 (1972). It was also based upon the knowing use of false testimony by the Government to gain a conviction. This was done in violation of the law as held in the United States Supreme Court cases of *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959) and *United States v. Agues*, 427 U.S. 97, 103 (1976).

These violations - viewed separately or together - have violated the Petitioner's Fifth Amendment right to due process and Sixth Amendment right to confrontation as guaranteed by the United States Constitution. Had these documents and agreements been disclosed as required by law, "...the result of the proceeding [the Petitioner's trial] would have been different." (*Youngblood v. West Virginia*, 547 U.S. 867

869 (2006) and *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

The District Court denied the Petitioner's 2255 Motion and also denied the request for a Certificate of Appealability. See **APPPENDIX B**, *"RULING ON PETIONERS MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE"* ("RULING") and **Appendix C**, *"ORDER"* (denial of Request for Certificate of Appealability." From this "RULING" and *"DENIAL,"* the Petitioner filed with the Second Circuit Court of Appeals a Request for a Certificate of Appealability. (See CA.2 Dk. 10-432-pr, captioned: *Joseph P. Ganim v. United States of America*). On August 26, 2010 the Second Circuit *"DENIED"* the Petitioner's request. See **Appendix A,** United States Court of Appeals for the Second Circuit denial of Certificate of Appealability dated August 26, 2010.

FACTUAL BACKGROUND OF THE PETITIONERS *BRADY/GIGLIO* CLAIM REGARDING THE FAILURE TO DISCLOSE *"TACIT"* AGREEMENTS BETWEEN THE GOVERNMENT AND THE TWO COOPERATING WITNESSES

In exchange for their cooperation, the Government witnesses, Paul Pinto and Leonard Grimaldi entered into favorable plea agreements with the Government.

Grimaldi Plea Agreement

On June 14, 2001, Grimaldi waived his right to be indicted and pleaded guilty to three-count information that charged him with RICO conspiracy, filing a materially false income tax return and criminal

forfeiture. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #5 Exhibit C))

The agreement summarized the penalties that Grimaldi faced, including imprisonment, fines, mandatory restitution and forfeiture. *Id.* at 1 & 2. With respect to forfeiture, Grimaldi agreed to forfeit his interest in the two assets which were worth approximately $175,000.

During Grimaldi's guilty plea allocution, the District Court advised him on the penalties that he faced as the result of his guilty plea and questioned him to ensure that he understood his rights and the consequences of his plea. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #3 Exhibit A, pp 21-23)

The District Judge also asked Grimaldi if the two assets were property derived from the proceeds of the RICO count and Grimaldi replied, *"Yes, Your Honor."* *Id.* at 39. Grimaldi's sentencing was delayed until after he testified for the Government at the trial of the Petitioner.

At Petitioner's trial, Grimaldi testified yet again about the plea agreement and the forfeiture count. When asked on direct examination about his understanding of the plea agreement, Grimaldi responded, in part, that he had agreed to turn over a

total of $175,000. Trial Tr. at 405, 408. When asked where the money that he was forfeiting came from, Grimaldi replied, "from the proceeds of an illegal relationship." *Id.* at 409.

On redirect examination, the following colloquy occurred:

AUSA: Now, going back for a second, in terms of the forfeiture provision in the plea agreement, have you already forfeited that money?

Grimaldi: Yes I have.

AUSA: And how much have your forfeited to the Government?

Grimaldi: $175,000.

Trial Tr. at 415. Grimaldi also acknowledged that the plea agreement separately required him to pay restitution to the City of Bridgeport and to pay all taxes, penalties and interest owed to the Internal Revenue Service ("*IRS*"). *Id.* at 408, 410.

Pinto Plea Agreement

Pinto entered into a similar agreement with the Government. Pinto pleaded guilty on June 13, 2001 to four-count information that charged him with RICO conspiracy, mail fraud, filing materally false tax returns and criminal forfeiture. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255)

(Attachment #1 Memorandum in Support #8 Exhibit F, 1 & 2). The agreement provided that Pinto would be subject to imprisonment, a fine, mandatory restitution and forfeiture. *Id.* at 2-3. With respect to forfeiture, Pinto agreed to forfeit assets valued at approximately $400,000 and that Pinto could pay the Government that amount in lieu of forfeiting the listed assets. Id at 4. Sentencing of Pinto was also delayed until after he had testified for the Government at the trial of the Petitioner.

At Petitioner's trial, Pinto was asked on direct examination about his understanding of the criminal forfeiture count. The following colloquy then occurred:

AUSA: And have you done that sir?

Pinto: Yes, I have.

AUSA: What was the total amount of money that you have since forfeiting to the United States?

Pinto: About $400,000

AUSA: And what does that money represent?

Pinto: It represents the money that was made improperly and illegally.

Trial Tr. at 4250.

Pinto also testified that in addition to forfeiting $400,000, under the terms of the plea agreement he was required to pay restitution to the City of Bridgeport and back taxes to the IRS. *Id.* at 4251-52,

4255. According to Pinto, he owed approximately $200,000 in back taxes and he had not paid the money at the time of his testimony. *Id.* at 4255.

On cross-examination Pinto testified that he had *"forfeited what [he] was asked to forfeit."* Trial Tr. at 5019. On redirect, Pinto testified that under the terms of his plea agreement he was required to *"make forfeiture,"* and he said that he complied with the agreement. Trial Tr. at 5802.

During closing arguments, the Government stressed the penalties that their witness, Pinto faced, including the $400,000 forfeiture, when it vouched for Pinto's credibility. The Government argued that the jury should believe Pinto because he pleaded guilty and exposed himself to *"28 years in prison, [paid] $400,000 in forfeited money, another $300,000 in taxes that are due, restitution yet to be imposed"* and had a lien placed on his home. Trial Tr. at 7607.

The Undisclosed TACIT Agreement Between the Government and Witnesses, Grimaldi and Pinto

Unknown to Petitioner, and on the very same date (June 13, 2001) that Pinto appeared before the District Court pursuant to a plea agreement, he and the Government executed a separate secret side deal. It was filed under seal in Pinto's criminal case per a motion made by Assistant U.S. Attorneys Apter and Sklaire. This agreement, entitled *"Escrow Agreement"*, provided that it *"shall supplement the February 22, 2001 cooperation agreement between Paul J. Pinto and the United States Attorney's Office for the District of Connecticut."* (See *Joseph P. Ganim v. U.S.A.* Dk #

3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #10 Exhibit H and #11 Exhibit I)

This undisclosed Escrow Agreement, however, contained the following significant provision: that the *"parties agreed that the proceeds derived from the sale or transfer of Pinto's Assets shall be used to satisfy the obligations of Paul J. Pinto, including restitution, criminal tax liability and forfeiture."* Significantly, the agreement further provided that: *"The parties agree that the Escrow Agreement be filed under seal at the time of Paul J. Pinto's first appearance before the Court." Id.* at 8.

The language in the Escrow Agreement conflicted with the terms of Pinto's disclosed plea agreement, which expressly provided that the proceeds from the sale of the properties (or the cash equivalent) would be forfeited to the Government. *Pinto's plea agreement allowed no other uses for these funds.* This provision also conflicted with Pinto's subsequent sworn testimony at Petitioner's trial. During the trial Pinto testified that the proceeds from the sale of the properties had already been forfeited to the Government. Defense counsel was never provided with a copy of the undisclosed sealed Escrow Agreement. This was despite the fact that the "*agreement*" was signed by Assistant U.S. Attorney Apter and Pinto (as well as his lawyer) as a "*supplement*" to Pinto's cooperation agreement.

Shortly after Grimaldi and Pinto signed the plea agreements and entered guilty pleas, the Government filed a number of motions under seal with the Court in each witness's respective case file. Two of these were filed in the Grimaldi matter on October 9, 2001, and December 7, 2001. In contrast to the language in Grimaldi's plea agreement, his testimony before the Grand Jury and his testimony at trial, the undisclosed registry motions provided that the ***"parties are in agreement that . . . said funds should be applied by the Court to satisfy the defendant's financial obligations, including restitution, criminal tax liability and forfeiture."*** [emphasis added] (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence(2255) (Attachment #1 Memorandum in Support #12 Exhibit J and #13 Exhibit K) The Government failed to disclose the language in the motions to Petitioner's defense counsel and they were not available to Petitioner since they were filed under seal.

The Government, on Pinto's behalf, filed similar motions in Pinto's case file. On or about September 7, 2001, March 6, 2002 and August 27, 2002, the Government filed motions under seal to deposit funds totaling $400,000 into the Court's Registry on Pinto's behalf. Like the Grimaldi registry motions, the Pinto motions provided that the *"funds should be applied by the Court to satisfy Pinto's financial obligations, including restitution, criminal tax liability and forfeiture."* (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1

Memorandum in Support #14 Exhibit L) The Government failed to disclose the Pinto Escrow Agreement and the Pinto registry motions and they were likewise not available to the defense. They were not available because they were filed under seal, not in the Petitioner's case file, but in his separate criminal file.

The Grimaldi and Pinto Sentences Following Petitioner's Conviction

Following a nine week trial, the Petitioner was convicted and sentenced on July 1, 2003 to a prison term of 108 months with 36 month supervised release. The Petitioner was also ordered to forfeit $175,000, pay $150,000 fine, $148,617.00 in restitution and approximately $248,000 to the IRS in taxes, penalties and interest. *United States of America v. Joseph P. Ganim,* U.S. District Court for the District of Connecticut (New Haven) Criminal Docket # 3:01-cr-00263-JBA-1 DK item #216).

On July 10, 2003, Pinto was sentenced by the Court to 24-months imprisonment and was ordered to pay $265,000 in restitution and a $100,000 fine. The Court directed that the monies to pay the restitution and fine were to be taken from Pinto's escrow account and the remainder was to be forfeited to the United States. Despite the fact that Pinto agreed to forfeit $400,000 and was found guilty of violating RICO, which requires a defendant to forfeit any interest in property obtained in violation of 18 U.S.C. § 1962, the Pinto judgment makes no mention of the $400,000 that Pinto claimed he had already forfeited. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion

to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #17 Exhibit O)

On November 17, 2003, a few months after Pinto's sentencing, the Government filed a *"Motion for Disbursement of Funds."* (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #18 Exhibit P). According to Attachment A of the motion, Pinto had made the following four payments into the Government escrow fund: $236,440.48; $133,000.00; and $29,980.00. Attachment A further provided that *"Distribution has or will be made to"* restitution, fine and special assessment. No mention was made of any distribution for forfeiture.

Approximately two months later, on January 23, 2004, the Government filed a *"Motion for Order of Forfeiture"* seeking a final order of forfeiture against Pinto.[1] On January 24, 2004, the District Court issued an order which provided that $4,869.70, the accrued interest in Pinto's escrow account after the payment of restitution and his fine, be forfeited to the United States. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside

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[1] The Government's motion is dated January 23, 2003, but that appears to be a typographical error since the attached Certificate of Service states that the motion was served on Pinto's counsel on January 23, 2004.

or Correct Sentence (2255) (Attachment #1 Memorandum in Support #19 Exhibit Q)

Contrary to the terms of the plea agreement and Pinto's trial testimony, the $400,000 that Pinto provided the Government was used to pay his restitution and fine. None of the $400,000 was used to pay Pinto's forfeiture obligation. The only money that was ultimately forfeited was the $4,869.70 from interest that had accrued in the escrow account. The small-accrued interest that was forfeited amounted to approximately one percent (1%) of the $400,000 that Pinto claimed at trial to have forfeited.

On July 16, 2003, Grimaldi was sentenced to 14-months imprisonment and was ordered to pay $136,000 in restitution and a $75,000 fine. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #3 Exhibit A) The District Judge also stated, *"in as much as you have an escrow account of $175,000, that may be used to pay your fine directly and the remainder to pay – count towards outstanding taxes."* *Id.* at 39. Despite the terms of the plea agreement, the fact that forfeiture is mandatory under RICO and Grimaldi's sworn testimony that he had already forfeited $175,000, Grimaldi did not forfeit any money to the United States.

The day after Grimaldi's sentencing, the Government filed an *"Unopposed Motion for Authorization to Disburse Funds from Court Registry."* The motion sought leave from the Court to disburse the $179,895 being held in Grimaldi's escrow account

as follows: **$75,000 to the United States in satisfaction of a fine imposed by the Court; and $104,895[2] to the Internal Revenue Service in satisfaction of Grimaldi's criminal tax liability**. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #20 Exhibit R). The District Court granted the motion and *"So Ordered"* the requested relief.

The Government's Motion to Dismiss the Grimaldi Forfeiture Count

Again, unknown to the Petitioner, on July 12, 2005, approximately two years after Grimaldi's sentencing, the Government filed an *"Unopposed Motion to Dismiss Forfeiture Allegation To Correct Clerical Error in Judgment and to Unseal Prior Motions to Deposit Funds."* The Government's motion sought to (i) dismiss the forfeiture allegation against Grimaldi in Count 3 of the charging information; (ii) strike all references to the forfeiture allegation from the judgment and commitment order; and (iii) unseal all prior motions to deposit funds in the Court Registry so that the Government could rely on the motions to support its current application for relief. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court, District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct

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[2] It should be noted that Grimaldi's total tax liability that was forgiven by the Government is well over $600,000.00 (See #3 Exhibit A, pp 37-38).

Sentence (2255) (Attachment #1 Memorandum in Support #21 Exhibit S).

In its motion, the Government stated that although Grimaldi signed a plea agreement and agreed to forfeit $175,000, the judgment issued by the Court *"imposed no forfeiture penalty." Id.* at 2, 3. According to the Government, the judgment listed defendant Grimaldi as guilty of all three counts, including the forfeiture count, but **"it failed to include any penalty or other sentencing term pertaining to forfeiture."** *Id.* at 3. The Government then stated in its motion the following:

> "The above-described record of the case makes clear that the United States, the Defendant, and the Court had all come **to an agreement** that the sentence not include a forfeiture penalty and that the escrowed $175,000 (plus interest) **not be applied to a criminal forfeiture but to the Defendant's fine and back taxes owed**." *Id.* at 6. [emphasis added]

Defense counsel was never informed that the Government, Grimaldi and the Court reached an *"agreement"* modifying the terms of Grimaldi's plea agreement. The motion itself did not disclose whether this agreement was arrived at before Grimaldi testified, but subsequent revelations and document review make such appear to have been the case. **On July 12, 2003, the District Court granted the motion, dismissed the forfeiture allegation in Count 3 and amended Grimaldi's judgment and**

the commitment order. See Ex. #22 Order and Amendment to Judgment, July 13, 2005.[3]

Petitioner's investigation also revealed that **Grimaldi never forfeited any money to the Government**, and that approximately two years after Grimaldi was sentenced, the Government quietly moved to dismiss Grimaldi's forfeiture count. Petitioner also discovered that **Pinto did not forfeit any of the $400,000 that he claimed at trial** and that the only money that was forfeited was $4,969.70 in accrued interest on his escrow account. In sum, Petitioner discovered that Grimaldi and Pinto, contrary to their trial testimony and the Government's representations, did not forfeit hundreds of thousands of dollars as part of their plea agreements, but instead had their forfeiture obligations secretly dismissed or excused as a quid pro quo for their cooperation and testimony. The Petitioner thereafter filed his 2255 motion with the District Court in New Haven, Connecticut.

In response to the Petitioner's 2255 motion, the Government filed affidavits from the Assistant U.S. Attorneys who handled the case, namely Assistant U.S. Attorneys Apter and Sklaire. Attached to the affidavits were e-mails and letters that were being

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[3] Although there is no indication as to the exact date upon which this "agreement" was entered into, the language contained in motions filed under seal in the Grimaldi matter by the Government with the Court were filed many months prior to the Petitioner's trial. This would seem to confirm that at least a "***tacit agreement***" between the Government, the Defendant and the Court was entered into *prior* to Grimaldi's testimony at the Petitioner's trial.

provided to the Petitioner for the first time. (See Appendix D and Appendix E)

THE E-MAILS AND LETTERS FILED WITH THE GOVERNMENT'S REPLY TO THE MOTION 2255.

Well before the Petitioner's trial, the Prosecutor, Apter himself, stated in these two e-mails and at least one letter, that there existed an "*agreement*" between Pinto and the Government to apply the funds from the forfeiture to Pinto's restitution following his testimony on behalf of the Government at the Petitioner's trial. The Apter E-mails (Appendix D) dated August 8, 2001 state:

> *"I do not oppose this because* ***pursuant to an agreement between Pinto and the Govt****, the proceeds from the sale are to be placed into the District Court Registry and following the disposition of the criminal case, will be used to pay restitution to the victims, etc."*

The second Apter E-mail (Appendix D) similarly states:

> *"He has also turned over an additional $133,000 which he obtained by liquidating a prudential securities acct., a Prudential IRA-SEP acct, and the Kasper Group 401(k) acct. for a total of $362,253.33. The money was also placed in the D.C.'s Registry pending the outcome of the Pinto criminal case.* ***Per agreement of the parties****, the funds may be used to satisfy Pinto's restitution obligation if so ordered by the Court."*

The letter from Apter to the attorney for the City of Bridgeport with a copy sent with a cover letter to Pinto's lawyer (Appendix E), reads as follows:

> *"For that reason, a condition of Mr. Pinto's guilty plea was that he will be required to make restitution to all victims of his criminal conduct. To that end,* ***Mr. Pinto has agreed to forfeit approximately $400,000 in assets that may be used to accomplish this purpose.***" [emphasis added]

The content of these e-mails and letters, which were written prior to the Petitioner's trial, make clear that "*per an agreement between Pinto and the Government*" and "*Per an agreement of the parties*" referring to Pinto and the Government – there was an "*agreement*". The agreement was as it states in these e-mails, letters and Escrow Agreement. That is, as part of a "*supplement to*" Pinto's cooperation agreement, the parties had agreed to apply the funds from the purported forfeiture to Pinto's "*other financial obligations.*" These obligations specifically included "*restitution*" as well as Pinto's fine and taxes. (See *Joseph P. Ganim v. U.S.A.* Dk # 3:08-cv-0179-JBA U.S. District Court District of Connecticut (New Haven). Docket #1 Motion to Vacate, Set Aside or Correct Sentence (2255) (Attachment #1 Memorandum in Support #10 Exhibit H). The language expressly states:

> *"The parties agree that this Escrow Agreement shall supplement the February 22, 2001 cooperation agreement between Paul Pinto and the United States Attorney's office for the District of Connecticut. The parties further*

agree that any violation of this agreement shall constitute a violation of the cooperation agreement."

It further states: *"The parties agree that the proceeds derived from the sale or transfer of the Assets shall be used to satisfy the obligations of Paul Pinto, including restitution, criminal tax liability and forfeiture."*

This express language should settle this issue. The parties did in fact have at least a "tacit agreement" **prior to the time** of the Petitioner's trial.

The District Court makes no mention of these e-mails or this letter in her Ruling denying the Petitioner's motion 2255. Instead, on page 15 of the Ruling, the District Court states: *"the Government's post trial favorable treatment of witnesses 'is not evidence that 'agreements' were secretly reached prior to the witnesses' testimony and improperly withheld from the defense."* (The Court cites to *United States v. Molina* 75 F.3d 600 602 (10th Cir. 1996). See Appendix B.) This was not the case.

The vast amount of pretrial documentation containing the terms of these secret agreements is sufficient -- even without the need to consider the Government's "post trial favorable treatment" -- to establish the existence of "secret agreements reached prior to the witness' testimony which were improperly withheld from the defense." These subsequently provided e-mails and the above referenced letter contain additional persuasive evidence that, at the very least, a "tacit agreement" existed prior to the Petitioner's trial.

Despite this new and very probative evidence of secret side-deals and false testimony presented by these Government witnesses at Petitioner's trial, the District Court denied the Petitioner's 2255 motion. Appendix B.

Following this denial, the Petitioner requested a Certificate of Appealability from the District Court Trial Judge (Arterton). That request was also denied. Appendix C. From this, the Petitioner filed a notice of appeal and requested the Second Circuit of Appeals issue a Certificate of Appealability. That request was denied on August 26, 2010.

REQUEST FOR WRIT OF CERTIORARI AND STANDARDS FOR GRANTING A COA

In making this request for a Writ of Certiorari from the denial of a request for a Certificate of Appealability on a 2255 motion based upon a ***Brady/Giglio*** violation, the Petitioner recognizes that the standard for issuing a Certificate of Appealability is "*whether jurists of reason would find it debatable whether the petition states a valid claim.*" Richardson v. Greene, 497 F.3d 212, 217 (2d Cir. 2007) (Quoting Slack v. McDaniel, 529 U.S. 473, 478 (2000).

28 U.S.C. 2253(c)(1) reads, in pertinent part, as follows:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from... (B) the final order in a proceeding under section 2255.

28 U.S.C. 2253(c)(2) reads, in pertinent part, as follows:

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of denial of a constitutional right.

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), which set standards for issuance of a COA reads, in pertinent part, as follows:

> The COA determination under 2253(c) requires an overview of the claims in the habeas corpus petition and the general assessment of their merits. We look to the District Court's application of the AEDPA to Petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. **This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a Court of Appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.** [emphasis added]

> To that end, our opinion in ***Slack***[4] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in ***Slack*** would mean very little if appellate review were denied because the prisoner did not convince a judge or, for that matter, three judges, that he or she would prevail. It is consistent with 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." ***Barefoot***, supra in 893, n. 4.

Love v. McCray, 413 F.3d 192, 194 (2d Cir. 2005) states that a COA is appropriate where reasonable jurists could find the issue or issues debatable.

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[4] ***Slack v. McDaniel***, 529 U.S. 473, 120 S.Ct 1595, 146, L.Ed.2d 542 (2000) defines the standard as follows:

> We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching a prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. 529 U.S. at 482, 120 S.Ct. at 603.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI: MULTIPLE CIRCUIT SPLIT ON THE ISSUE OF REQUIRING THE GOVERNMENT TO DISCLOSE A "TACIT AGREEMENT" UNDER *BRADY/GIGLIO*.

There is a multiple circuit split as to whether or not evidence of a ***tacit agreement*** between the Government and a cooperating witness for benefits or favorable treatment in exchange for the witnesses' testimony must be disclosed to the defendant under *Brady / Giglio*.

Stated another way: There is a multiple circuit split as to whether an *expressed* agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment

This issue has yet to be spoken on by the United States Supreme Court. The Supreme Court has found that an ***express*** agreement between a witness and the prosecution is favorable evidence under *Brady / Giglio* but not on the disclosure of *tacit agreements* between the government and cooperating witnesses. This includes the disclosure of actions that take place after a defendant's trial.

The Ninth Circuit and the Seventh Circuit have specifically addressed this issue of a "*tacit agreement*". Both of these circuits have held these to be favorable evidence under *Brady / Giglio* that must be disclosed. (See *Wisehart v. Davis*, 408 F.3d 321, 323-324 (7th Circuit 2005) and *United States v. Schaffer*, 789 F.2d 682, 685 (9th Cir. 1986)) The Eighth Circuit has gone even further and held that "no agreement between the

Government and a witness is required so long as the non-disclosed evidence is impeachment evidence. (See *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989))

On the other end of the spectrum, the Second Circuit has held that the Government is not duty bound to disclose anything but a full express agreement made by the Government prior to that witness's testimony. It has held that the Government is not compelled under *Brady/Giglio* to disclose a ***tacit*** understanding or agreement between the Government and a cooperating witness. This holds true even if the Government in fact intends to reward the witness with favorable treatment following his testimony, as was done by the Government in the Petitioner's case. (See *Shabazz v. Artuz*, 336 F.3d 154, 157 (2d Cir. 2003)

The Sixth Circuit had originally sided with the Ninth and Seventh Circuit in the case of *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006) holding that "*a tacit agreement is favorable evidence under Brady.*" The Sixth Circuit went on to say that the Second Circuit's approach in *Shabazz* "*has the markings of potential prosecutorial abuse*". *Bell, supra* at 753. However, after issuing that opinion on August 25th of 2006, an En Banc panel of the Sixth Circuit issued a somewhat contrary decision on January 4, 2008. That Court sitting En Banc held that:

> "In sum although we do not take issue with the principle that the prosecution must disclose a tacit agreement between the prosecution and a witness, it is not the case that, if the Government chooses to provide assistance to a witness following a trial, a court must

> necessarily infer a preexisting deal subject to disclosure under Brady. The Government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intent to do so, provided that it does not promise anything to the witness prior to their testimony." *Shabazz v. Artuz*, 336 F.3d 154-165 (2d Cir. 2003).

In the instant matter where the Petitioner is requesting this Court's review by way of this Writ of Certiorari of the Second Circuit's decision denying the request for a Certificate of Appealability, the Petitioner is also requesting this Honorable Court to review the District Court's reliance on the Circuit case of *United States v. Molina* in her decision denying the 2255 motion.

On page 15 of the "*Ruling*", **(Appendix B)** the District Court stated:

> "*That the court thereafter deemed Pinto's forfeiture obligation to be satisfied by $4,869.70 and later dismissed Grimaldi's forfeiture count does not demonstrate that at the time of Petitioner's trial either Pinto or Grimaldi expected these dispositions or that an agreement existed between the Government – which took no position at Pinto and Grimaldi's sentencing on the matter of their forfeiture obligation---and Pinto and Grimaldi. Cf. United States v Molina* 75 F.3d 600, 602 (10th Circuit 1996) (the Government's post trial favorable treatment of witnesses "is not evidence that agreements of such favorable treatment "were secretly reached

prior to the witnesses' testimony and improperly withheld from the defense")

Had this case been prosecuted in the Eighth Circuit or even in the Seventh or Ninth Circuit, the District Court would have had to consider *"the Government's post trial favorable treatment of witnesses [as] evidence that agreements of such favorable treatment "were secretly reached prior to the witnesses' testimony and improperly withheld from the defense."* With that, and the documents now unsealed, the District Court would most certainly have concluded that there was a violation of *Brady / Giglio.* Yet, because this case was prosecuted in the Second Circuit, the District Court was able to rule against the Petitioner on this critical Fifth and Sixth Amendment issue.

This conclusion violates the Petitioner's rights under the Fifth and Sixth Amendments to the U.S. Constitution. This is because:

> *"...the district court's analysis would shield the prosecution's lenient treatment from the* Brady *rule with respect to a tacit agreement so long as the prosecution's actions took place <u>after</u> the petitioner's trial. The error in such a position is that when the prosecution makes good on the tacit agreement should not dictate whether the agreement should have been disclosed." Bell v. Bell* 460F.3d 739 (6th Circuit 2006) [emphasis added] (Also see *Bell v. Bell* 512 F.3d 223 (6th Circuit 2008) (En Banc) and *Bagley,* 473 U.S., at 678, 105 S.Ct. 3375).

In the Sixth Circuit En Banc decision in *Bell v. Bell supra*, at page 246, Justice Clay in his dissent wrote the following:

> *"In order to guard against these dangers and facilitate Brady's ultimate purpose of ensuring fair trials, this court should hold that two types of evidence are subject to disclosure. First, any evidence that reasonably suggests that the prosecutor conveyed an expectation of favorable treatment to the testifying witness should be disclosed.* See Schaffer, *789 F. 2nd at 690*; Reutter v. Solem, *888 F. 2nd 578, 582 8th Circuit (1989). Second, the prosecution should be required to disclose any evidence in its possession that suggests that the witness actually harbors an expectation of favorable treatment, regardless of whether the prosecution created such an expectation.* See *United States v. Risha,* 445 F.3d Y 298, 303 n. 5 (3rd Circuit 2006)"
>
> *"Construing "promises of reward" or "inducement" to include these two types of evidence would promote the disclosure of evidence actually likely to bias prosecution witnesses.* See *Majority Op.* at 235; see also *Shabazz v. Artuz,* 336 F. 3rd 154, 165 (Second Circuit. 2003). *("The Government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witness prior to their testimony."), this rule would foreclose a crafty prosecutor's strategy of eschewing a formal*

> *agreement, only to achieve the same result through innuendo or implication. Additionally, it would resolve he nebulous issue of determining whether subjective expectations had given rise to a mutual understanding between the prosecution and the witness by making that issue one for the jury." Bell supra* at 247.

The District Court in the instant case, much like the majority in this En Banc Sixth Circuit case of *Bell v. Bell* mischaracterizes the rule proposed by the dissent [in *Bell*] as creating "a new definition of *Brady* material that includes possible post trial witness favorable treatment." *Bell v. Bell*, 512 F.3d 223, 247. (Also see majority opinion at 234) The rule proposed by Justice Clay in his dissent did not require pretrial discovery of post-trial witness treatment. Rather, he simply proposes that we adopt the conclusion compelled by *Giglio* and *Bagley* – namely, that the prosecution must disclose evidence of any possible tacit agreements between it and the prosecution witness prior to trial. "*Brady's concern is not with prosecutorial bad faith, but with accurate outcomes.*" See *Brady*, 373 U.S. at 87, 83 S.Ct. 1194; See also *United States v. Bagley*, 473 U.S. 675, 105 S.Ct. 3375 (1985)

> "*Brady is <u>not</u> limited to formal plea bargains, immunity deals, or other notarized commitments. It applies to 'less formal', unwritten, or tacit agreements, so long as the prosecution offers the witness a benefit in exchange for his cooperation,... so long as in other words, as the evidence is favorable to the accused." Akrawi v. Booker*, 572 F.3d 252 (6th

Cir. 2009.) *Harris v. Lafler,* 553 F.3d 1028, 1034 (6th Cir. 2009.)

In the instance case, because this evidence was favorable impeachment evidence involving the Government's two key witnesses, it is clear that a timely disclosure by the Government of these agreements "*could have reasonably been taken to put the whole case in such a different light as to undermine confidence in the verdict.*" *Youngblood*, 547 U.S. at 870 (quoting *Strickler,* 527 U.S. at 280 and *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

CONCLUSION

As demonstrated in the cases cited above, this case presents an important issue regarding the need for a uniform standard necessary to establish exactly what is a *Brady / Giglio* violation when the Government fails to disclose exculpatory evidence to a defendant--only because all of the terms of the agreement had not been included in an express agreement.

This case demonstrates how, without this rule, the Government is free to unilaterally eviscerate the obligation to disclose all of the terms of cooperation agreements with witnesses either by not reducing all of the terms to writing or by changing the terms from what has been disclosed to the defendant after his trial is over. This kind of approach cannot be what this Court meant when it issued its rulings in *Brady* and *Giglio* as well as the many cases that have followed.

This Court should grant this Writ of Certiorari to resolve the many conflicts among the federal courts and to assure that defendants who are subjected to

Brady/Giglio violations in every circuit are treated uniformly regardless of where they are tried.

Respectfully submitted,

By

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Date: November 24, 2010

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 10-432-pr
D.Conn. 08-cv-1759
Arterton, J.

[Filed August 26, 2010]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of August, two thousand ten,

Present:

Robert A. Katzmann,
Peter W. Hall,
Denny Chin,
Circuit Judges.

Joseph P. Ganim,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
United States of America,	)
	)
Respondent-Appellee.	)
	)

Appellant, *pro se*, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
/s/ Catherine O'Hagan Wolfe, Clerk

SAO-MWV

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:08cv1759 (JBA)
Criminal No. 3:01cr263 (JBA)

[Filed December 30, 2009]

Joseph P. Ganim, *Petitioner*,	)
v.	)
United States of America, *Respondent*.	)

RULING ON PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Petitioner Joseph P. Ganim was convicted by a jury on March 19, 2003 on seven counts for his activities during his tenure as mayor of Bridgeport, Connecticut, for which a 108-month sentence of imprisonment was imposed. His motion under 28 U.S.C. § 2255 attacks these convictions for racketeering, racketeering conspiracy, extortion, honest services mail fraud, bribery, conspiracy to commit bribery, and filing false income tax returns. Mr. Ganim claims principally that he was denied due process because the Government

failed to disclose what he surmises were secret side deals made with the Government's two chief cooperating witnesses, Paul J. Pinto and Leonard J. Grimaldi, regarding their criminal financial obligations arising out of charges to which they had pleaded guilty. Mr. Ganim also alleges that the Government failed to disclose that at the time of his trial, Pinto had been under psychiatric care, and that a Government trial witness, Theresa Supple, was the target of an investigation by the U.S. Attorney's office. Mr. Ganim argues that these alleged failures by the Government constitute violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Because Petitioner's claims lack legal and factual merit, his motion will be denied.

I. Background[1]

Mr. Ganim was mayor of Bridgeport from 1991 to 2003, when he was convicted. "[Mr.] Ganim developed close relationships with [cooperating witnesses] Grimaldi and Pinto over the years that followed" his first election. *United States v. Ganim*, 510 F.3d

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[1] The Court assumes the reader's familiarity with the factual and procedural background of this case, and provides only a brief summary here. For a fuller account, *see United States v. Ganim*, 225 F. Supp. 2d 145 (D. Conn. 2002) (denying motion to dismiss indictment); *United States v. Ganim*, No. 3:01cr263(JBA), 2003 WL 21516581 (D. Conn. Jun. 30, 2003) (denying renewed motion for judgment of acquittal); *United States v. Ganim*, No. 3:01cr263 (JBA), 2006 WL 1210984 (D. Conn. May 5, 2006) (denying motion for resentencing), *aff'd*, 256 F. App'x 399 (2d Cir. 2007); *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007) (affirming conviction).

134,137 & n.2 (2d Cir. 2007). In exchange for Pinto's and Grimaldi's cooperation in its investigation and prosecution of Mr. Ganim, the Government negotiated plea agreements and cooperation agreements with both. Through Grimaldi and Pinto's testimony, the Government adduced evidence that Mr. Ganim awarded privatization contracts to, and took favorable action toward, entities represented by either Grimaldi or Pinto, and required the entities to pay high fees to Grimaldi and Pinto with the understanding that part of the fees would be passed on to Mr. Ganim to get his approvals. Grimaldi and Pinto used a portion of these "fees" to support Mr. Ganim's lavish entertainment preferences and to otherwise benefit him. *See generally Ganim*, 510 F.3d at 137–40. Mr. Ganim also required that Grimaldi use a portion of these fees to employ Mr. Ganim's wife, overpaying her and in cash. *Id.* at 138.

Before the guilty verdict Mr. Ganim orally moved for a Judgment of Acquittal (Case No. 3:01cr263, Doc. # 149 (Feb. 25, 2003)), which the Court denied on June 30, 2003 (*see id.* at Doc. # 214). Mr. Ganim filed his Notice of Appeal on July 17, 2003 (*id.* at Doc. # 225), and filed his appeal brief on July 20, 2006.[2] The

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[2] Because the Court disposes of Mr. Ganim's petition on other grounds, it does not reach the Government's argument that the petition is procedurally barred because Mr. Ganim could have raised these issues on direct appeal because his post-trial discovery of the bases pre-dated his Second Circuit briefing. The Government's argument is that Mr. Ganim could have added the documents he obtained post-trial to the record on direct appeal by moving under Rule 33 for a new trial. It bears noting that there is no published authority requiring claims-exhaustion via Rule 33 to preserve them for appeal. *See, e.g., United States v. Moronta-Garcia*, No. 1:92cr234(CSH), 1995 WL 23549, *2 (S.D.N.Y. Jan. 20, 1995).

conviction was affirmed in 2007. *Ganim*, 510 F.3d at 152.

II. The Government's *Brady* and *Giglio* Obligations

The "due process rights as declared in *Brady* . . . and its progeny, *e.g.*, *Giglio*," *United States v. Douglas*, 525 F.3d 225, 244 (2d Cir. 2008), are violated "when the government fails to disclose evidence materially favorable to the accused," *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) (citing *Brady*, 373 U.S. at 87). "Thus, . . . '[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have ensued.'" *Douglas*, 525 F.3d at 244–45 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" which is demonstrated "upon a 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Youngblood*, 547 U.S. at 870 (quoting *Strickler*, 527 U.S. at 280, and *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

III. Claims

A. Secret Side Deals Between Government and Pinto and Grimaldi

Mr. Ganim's chief argument is that the reduction of Pinto's forfeiture obligation from $400,000 to $4,869.70 and the dismissal of the $175,000 forfeiture count against Grimaldi—each of which occurred after Mr. Ganim's conviction—reflect the execution of what he alleges are undisclosed side deals between each of them and the Government that existed at the time of Mr. Ganim's trial. Thus, Mr. Ganim surmises, the Government knowingly permitted Pinto and Grimaldi to testify falsely at trial regarding the penalties each faced. In support of his theory, Mr. Ganim points to an escrow agreement between Pinto and the Government (Pinto Escrow Agreement, Ex. H[3]), which he argues was not provided to him in the Government's disclosures in violation of *Brady* and which reflects the Government's secret agreement with Pinto that the escrowed funds would be disbursed in satisfaction of his fines, penalties, restitution "*and*" forfeiture, rather than "*or*" forfeiture, as stated in the disclosed plea agreement.

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[3] Exhibits labeled by letter are attached to Petitioner's Memorandum in Support of his Motion under § 2255 [Doc. # 1-1]. Exhibits labeled by number are attached to the Government's Opposition [Doc. # 9].

1. Plea Agreements, Testimony, and Sentencing of Pinto and Grimaldi

In June 2001 Pinto pleaded guilty to conspiracy to violate RICO, mail fraud, tax fraud, and a criminal forfeiture count. He agreed to certain criminal financial obligations, including federal tax liability estimated to be $300,000, an unspecified amount of restitution, and forfeiture of approximately $400,000 which represented his interest, or anticipated revenues from his sale of his interest, in two properties in Fairfield, Conn. He and the Government also agreed that he was subject to a fine of up to $1 million. (*See* Pinto Plea Agmt., Ex. F; Pinto Guilty Plea Tr., Ex. X.)[4] The plea agreement specified that all funds would be deposited in an escrow account.[5] In June 2001 Grimaldi pleaded guilty to conspiracy to violate RICO and tax fraud as well as a criminal forfeiture count.

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[4] Specifically, Pinto and the Government agreed that to satisfy his criminal financial obligations he would forfeit two properties, one on Fairfield Beach Road and the other at Burrwood Common, both in Fairfield. Pinto and the Government agreed that Pinto would forfeit $75,000 from the proceeds from sale of the Burrwood Common property, with "the balance of [his] equity in the [Burrwood Common] property [to] be applied against [his] 1997–2000 federal income tax liability." They estimated that Pinto's interests in the properties, "less the amount to be applied toward [Pinto's] tax liability, is worth approximately $400,000," and that Pinto would forfeit this amount, either by direct forfeiture of the properties or by payment of $400,000 in cash. (Pinto Plea Agmt. at 3–4; Pinto Guilty Plea Tr. at 18, 23–24, 48.)

[5] (*See* Pinto Cooperation Agmt., Ex. I, at ¶ 6; Pinto Escrow Agreement, Ex. H; Letter from Gov't to Richard Meehan, Ex. M, at 1, 3, 5; Apter Aff., Ex. 8, at ¶¶ 5–6; Sklaire Aff., Ex. 9, at ¶¶ 5–7.)

Grimaldi agreed to certain criminal financial obligations, including an unspecified amount of federal tax liability, an unspecified amount of restitution, and forfeiture of approximately $175,000, comprised of his $25,000 bank account and his interest, or anticipated revenues from his sale of his interest, in a property in Redding, Conn. He and the Government also agreed that he was subject to a fine, which could be over $1 million. (*See* Grimaldi Plea Agmt., Ex. C; Grimaldi Guilty Plea Tr., Ex. D.)

During Mr. Ganim's criminal trial, Grimaldi and Pinto each testified about the terms of their agreements with the Government. Grimaldi testified that he had pleaded guilty to a "[r]acketeering conspiracy and tax fraud" as well as to a forfeiture count in the amount of $175,000 plus restitution. He testified that he faced up to imprisonment for 20 years for the RICO violation and three years for tax fraud. He acknowledged "a forfeiture provision in which I agreed to turn over . . . a total of $175,000" derived from a bank account containing $25,000 as well as "$150,000 from the proceeds of the sale of the house" in Redding; that his "restitution to the people of the [C]ity of Bridgeport . . . would be determined by the Court;" that the sums agreed to in his plea agreement did not cover any potential tax liability; that he had a cooperation agreement with the Government stating that he would be prosecuted for perjury if he did not testify truthfully in grand juries and criminal trials, and otherwise cooperate fully with the government; and that as of the time of Ganim's trial he had already forfeited the $175,000. On cross-examination Grimaldi testified that he knew that in addition to imprisonment he was "exposed to a substantial fine as well," and that by cooperating with the Government he

avoided being charged with a number of other crimes. He also agreed that his forfeiture count specified less than one-fifth of what he estimated to be his gains from the RICO conspiracy. (*See* Trial Tr. at 405–06, 1221–22, 405–10, 413–15, 1221–24, 1282–83, 5010–11.)

Pinto testified at Mr. Ganim's criminal trial that he had pleaded guilty to "a four-count information" charging him with a RICO conspiracy, mail fraud, income tax fraud, and criminal forfeiture. As to the forfeiture count, Pinto testified that he sold the two properties in Fairfield (i.e., the Fairfield Beach Road and Burrwood Commons properties) as well as "other assets in order to pay over and hand over to the [G]overnment the proceeds from the illegal activities." He testified that at the time of trial he had already forfeited "[a]bout $400,000," which "represent[ed] the money that [he] made improperly and illegally." He further testified that he was subject to imprisonment for 20 years for the RICO charge, five years for the mail fraud count, and three years for the tax fraud count, and that "[i]n addition to those penalties," he was "required to make restitution to the city of Bridgeport" in an amount that would later be determined by the Court and was also required to pay, but had not yet paid, approximately $200,000 in back taxes and late penalties. He also acknowledged that he was subject to a fine of up to "twice the gross gain to [him]self resulting from the [RICO] offense," which was" up to $4 million." He further testified about his cooperation agreement with the Government "to tell the [G]overnment all the information about [his] illegal activities and the activity of others, to cooperate fully with the investigation, to testify if [he is] called upon to testify, and to be truthful and honest with all [his]

information that [he] tell[s] the [G]overnment," in hopes of receiving leniency at sentencing. (*See* Trial Tr. at 4248–57, 5001, 5800–04.)

Pinto agreed that the Government could have charged him with far more counts than it did in fact charge him with, and testified that if he "fail[ed] to tell the truth" the Government would "throw[] out" the cooperation agreement and could prosecute him for perjury in addition to counts not listed in the four-count Information. He also agreed that his forfeiture count specified less than one-fifth of what he estimated to be his gains from the RICO conspiracy. He agreed that he had expected approximately $325,000 from selling the Fairfield Beach Road property and $75,000 sale of the Burrwood Commons property, which proceeds would be forfeited to the Government, but that because his sale of the Fairfield Beach Road property actually netted only approximately $220,000, and he "had to put money in to close th[e] sale" of the Burrwood Common property, he had to liquidate other assets to satisfy his $400,000 forfeiture obligation. He testified that after doing so, by the time of trial he "really [did]n't have any assets other than the house that [his] wife owns," on which the Government had placed a lien which could obligate him "to sell the house in order to pay [his] debts." (*See* Trial Tr. at 5002–12, 5803–06.)

Four months after the guilty verdict was rendered against Mr. Ganim, the Court sentenced Pinto and Grimaldi. Consistent with the plea agreements reached with Pinto and Grimaldi, the Government moved for downward departures from applicable Sentencing Guideline ranges based on their substantial assistance to the Government in its

investigation and prosecution of Mr. Ganim. On July 24, 2003 the Court imposed on Grimaldi a 14-month sentence of incarceration and a $75,000 fine. The Court also imposed joint and several liability on Grimaldi, Pinto, Ganim, and two others "to pay restitution of $136,000 to Bridgeport Energy," and required Grimaldi to "cooperate with the Internal Revenue Service to pay all outstanding back taxes, interest and penalties." (Grimaldi Judgment, Ex. 5; Case No. 3:01cr131, Doc. # 39 (July 24, 2003).) On July 17, 2003 the Court imposed on Pinto a 24-month sentence of incarceration, a $100,000 fine, joint and several liability on Pinto and others[6] "for restitution in the amount of $316,700.00 to the City of Bridgeport," joint and several liability on Pinto and others[7] "for restitution in the amount of $104,000 to the City of Bridgeport," and joint and several liability on Pinto, Grimaldi, Ganim, and another "for restitution in the amount of $136,000.00 to Bridgeport Energy." The Judgment specified:

> Total restitution owed is $556,700.00. Restitution in the amount of $265,000.00 is due immediately which will be taken from the defendant's escrow account. Defendant shall pay a fine of $100,000.00 which will be taken from defendant's escrow account and the remainder shall be forfeited to the USA. . . . Defendant shall cooperate with Internal

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[6] For this restitution joint and several liability was imposed on Pinto, Alfred Lenoci, Jr., Patrick Coyne, Scott Arena, and Brian Bannon.

[7] For this restitution joint and several liability was imposed on Pinto, Alfred Lenoci, Jr., and Fales Trucking.

> Revenue Service in the payment of all back taxes, interest and penalties currently $479,251.00.

(Pinto Judgment, Ex. O; Case No. 3:01cr130, Doc. # 37 (July 17, 2003).)

In the twenty-nine months following Grimaldi's and Pinto's guilty pleas, the Government moved a number of times to deposit funds—some derived from the sales of Grimaldi's and Pinto's properties and liquidations of their accounts—into an interest bearing escrow account.[8] On July 17, 2003 the Government moved for an order disbursing some of these escrowed funds in satisfaction of Grimaldi's "fine imposed by the Court" ($75,000) and his "criminal tax liability" ($104,895).[9]

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[8] On November 17, 2003 the Government cataloged all payments made into the escrow fund by name, date of payment, amount of payment, and the object of distribution of each payment. The accounting reflected 32 payments between September 14, 2001 and November 13, 2003 totaling $1,990,716.76 made by eleven people and one company: Scott Arena, Brian Bannon, Patrick Coyne, Fales Trucking, Ganim, Grimaldi, Alfred Lenoci, Jr., Alfred Lenoci, Sr., Pinto, Michael Schinella, Frank Sullivan, and Mark Trinkley. (*See* Gov't's Mot. Disbursement, Nov. 17, 2003, Exs. P and 3, at Att. A.) Seven of these payments were made on behalf of Grimaldi and Pinto. (*See id.*; *see, e.g.*, Gov't's Motions to Deposit Funds, Ex. K (Dec. 7, 2001; $150,000 on behalf of Grimaldi), Ex. L (Mar. 6, 2002; $133,000 on behalf of Pinto), Ex. 14 (Sept. 17, 2001; $236,440.48 on behalf of Pinto), and Ex. 15 (Aug. 27, 2002; $29,980.00 on behalf of Pinto).)

[9] (Gov't's Mot. Disbursement, July 17, 2003, Ex. R; *see also* Gov't's Mot. Disbursement, Nov. 17, 2003, Exs. P and 3, at 2 n.3 (noting $180,645.44 in "payments and interest credited to Mr. Grimaldi" and accounting for application of this sum to his "tax liability" and

Four months later, on November 17, 2003, the Government moved to disburse the remaining $851,685.68 "in satisfaction of the defendants' joint and several restitution obligations, criminal fines and other financial obligations," including restitution to the City of Bridgeport and Bridgeport Energy, the fines owed by Grimaldi and Pinto, Grimaldi's IRS tax liability, and other monetary obligations.[10] The Court entered a Forfeiture Order on January 24, 2004 forfeiting to the Government "the right, title, and interest to $4,869.70," in satisfaction of Pinto's forfeiture count of conviction. (Ex. Q.) Eighteen months later, on July 12, 2005 and in response to a query from the Clerk, the Government moved to dismiss the forfeiture count against Grimaldi and delete references in his judgment to the forfeiture count in order to "'conform'" Grimaldi's sentence "'to the term which the record indicates was intended'" since "both the record and the actual sentence clearly indicate the Court's intent that the sentence not include any forfeiture penalty." (Gov't's Mot. Dismiss Grimaldi Forfeiture Count, Ex. S (quoting *United States v. Kaye*, 739 F.2d 488, 490 (9th Cir. 1984));

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his "fine" as well as "forfeit[ure] to the United States" of the remaining "balance of $750.44").)

[10] Specifically, the Government sought payments of $430,170.54 as "[r]estitution to City of Bridgeport," $136,000.00 as "[r]estitution to Bridgeport Energy," $100,000.00 "[t]o be credited to Pinto's fine," $75,000.00 "[t]o be credited to Grimaldi's fine," $104,895.00 "[t]o be credited to Grimaldi's IRS tax liability," and $5,620.14 "[t]o be forfeited to the United States." According to the Government, after these payments neither Grimaldi nor Pinto would have any remaining unpaid criminal monetary obligations. (Gov't's Mot. Disbursement, Nov. 17, 2003, Exs. P and 3, at 1, 5.)

Kopel Aff., Ex. 19, at ¶ 2.) This motion was granted. (Ex. T.)

2. Disclosure of the Pinto Escrow Agreement

The Government's failure to provide Mr. Ganim with a copy of the Pinto Escrow Agreement is not a *Brady* violation because the Government disclosed to Mr. Ganim the existence of the escrow agreement almost seventeen months before trial in its *Giglio* document list. As well, Pinto's cooperation agreement—which was produced—references the Pinto Escrow Agreement. (*See* Pinto Cooperation Agmt., Ex. I, at ¶ 6; Letter from Gov't to Richard Meehan, Ex. M, at 1, 3, 5.) "*Brady* cannot be violated if the defendant[] had actual knowledge of the relevant information," *United States v. Zigori*, 111 F.3d 307, 320 (2d Cir. 1997), and "evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence," *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995). Although the Government's pre-trial *Giglio* disclosure letter directed to Mr. Ganim's counsel did not include a copy of the escrow agreement, clearly Mr. Ganim's counsel had notice of its existence. Under the circumstances, the Government cannot be said to have suppressed the agreement by having failed to provide an actual copy to accompany disclosure of its existence. *See also United States v. Zackson*, 6 F.3d 911, 919 (2d Cir. 1993) (no *Brady* violation where despite non-disclosure defendant "was nevertheless aware that the issue [addressed by non-disclosed material] may have warranted some additional investigation").

3. Existence of Side Deals

As discussed below, Mr. Ganim relies on three circumstances in support of his surmise that side deals existed between the Government and Grimaldi and Pinto: (1) the unproduced escrow agreement is the only document stating that Pinto's payment of $400,000 would satisfy all of his criminal financial obligations;(2) the Government's motions under seal to deposit funds into, and disburse funds from, an escrow account; and (3) the discrepancy between (a) the dollar amounts specified in the forfeiture counts against Grimaldi and Pinto and (b) the Government's dismissal of the forfeiture count against Grimaldi and the greatly reduced amount it required from Pinto as forfeiture.[11]

Mr. Ganim argues that the secret side deal between Pinto and the Government is manifested by the Pinto Escrow Agreement's language stating that the $400,000 Pinto would pay would satisfy his restitution, criminal tax liabilities, "*and*" forfeiture, while the Plea Agreement stated it would satisfy his restitution, criminal tax liabilities, "*or*" forfeiture. This argument is unavailing because the escrow agreement was not

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[11] Beyond these circumstances, Mr. Ganim provides no evidence of any secret side deal between the Government and either Pinto or Grimaldi, and his assertion that these secret side deals exist is not based on his or anyone else's personal knowledge. Since nothing is offered to augment the written submissions of the parties or rebut the affidavits attached to the Government's memorandum, "a hearing would not offer any reasonable chance of altering [the Court's] view of the facts." *Chang v. United States*, 250 F.3d 79, 86 (2d Cir. 2001). Therefore, an evidentiary hearing at which live testimony may be received is unnecessary. *See id.*

suppressed. Moreover, the escrow agreement used both the conjunctive ("and") and the disjunctive ("or") to describe the relationship between Pinto's payments and his criminal financial obligations, i.e., restitution, tax liability, and forfeiture.[12]

In any event, at least until the witnesses' sentencings, the Government and counsel for both Pinto and Grimaldi were of the understanding that both witnesses were liable for the amounts specified in their forfeiture counts of conviction. Each of the two Assistant U.S. Attorneys who were trial counsel in *United States v. Ganim* submit unrebutted affidavits which aver that:

> The Government had no unwritten 'side deals,' understandings, promises or agreements with Mr. Pinto or Mr. Grimaldi on any issues. Specifically, there were no agreements or understandings with Mr. Pinto or Mr. Grimaldi—at any time—that their forfeiture obligations, as memorialized in their plea agreements, would later be forgiven, or that the monies paid by Mr. Pinto and Mr. Grimaldi in satisfaction of their forfeiture obligations would

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[12] The Escrow Agreement stated that in light of "the intention of the parties that" the Fairfield Beach Road and Burrwood Common properties "shall be used to satisfy, in whole or in part, any restitution, criminal tax liability *or* forfeiture ordered by" the Court, Pinto, and the Government "d[id] covenant and agree . . . that the proceeds derived from the sale or transfer of [those two properties] shall be used to satisfy the obligations of Paul J. Pinto, including restitution, criminal tax liability *and* forfeiture." (Pinto Escrow Agreement, Ex. H, at 1–2 (emphases added).)

> be used to pay the other financial obligations outlined in their respective plea agreements.
>
> . . .
>
> I understood that the ultimate disposition of the escrowed funds would be decided by the district court at the time of sentencing.

(Apter Aff., Ex. 8, at ¶¶ 4, 8; Sklaire Aff., Ex. 9, at ¶¶ 4, 8.) Other government officials involved in the investigation and prosecutions of Ganim, Grimaldi, and Pinto—as well as Pinto's and Grimaldi's counsel—also aver that no unwritten side deals exist or existed between the Government and Pinto or Grimaldi. (Wethje Aff., Ex. 10, at ¶ 4 (IRS agent); Adams Aff., Ex. 11, at ¶ 4 (lead case agent for the FBI); Pickerstein Aff., Ex. 12, at ¶ 5 (Pinto's counsel); Cowdery Aff., Ex. 13, at ¶ 5 (Grimaldi's counsel).)

Similarly, the letters under whose cover counsel for Grimaldi and Pinto sent checks to be deposited in the Court's Registry reflect that before and during Mr. Ganim's trial, counsel's understanding was that the funds would be used to satisfy the witnesses' forfeiture obligations.[13] This understanding that Pinto and Grimaldi would pay the sums specified in their forfeiture counts persisted well beyond the conclusion of Mr. Ganim's criminal trial on March 19, 2003. Counsel for Pinto believed "going into sentencing" four

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[13] (*See, e.g.*, Gov't's Motion to Deposit $29,980 on behalf of Pinto, Ex. 15, at Att. A (notation by Pickerstein that "funds are subject to forfeiture"); Cowdery Aff., Ex. 13, at ¶¶ 6–7 (noting that checks in amount of $25,000 and $150,000 were in satisfaction of forfeiture).)

months later that the $400,000 in escrow would not "be allocated for purposes other than forfeiture" (Pickerstein Aff. at ¶ 15), and counsel for Grimaldi believed even after his client's sentencing on July 24, 2003 that the $175,000 Grimaldi had paid was in satisfaction of his forfeiture obligations (Cowdery Aff. at ¶¶ 10–13). The Court's colloquy with Pinto's counsel at Pinto's sentencing further reflects this understanding. (*See* Pinto Sentencing Tr., Ex. B, at 4 (noting that it was counsel's "understanding" that Pinto's criminal forfeiture conviction would "follow[] from the other three" counts to which he pleaded guilty).) The same is true of the Court's colloquy with Grimaldi's counsel. (*See* Grimaldi Sentencing Tr., Ex. A, at 31 (noting that it was counsel's "understanding" that in addition to "restitution to Bridgeport Energy for $136,000, . . . Grimaldi ha[d] placed . . . the proceeds from his forfeitures in the amount of $175,000 in an escrow account with the court.").)

That the Court thereafter deemed Pinto's forfeiture obligation to be satisfied by $4,869.70 and later dismissed Grimaldi's forfeiture count does not demonstrate that at the time of Petitioner's trial either Pinto or Grimaldi expected these dispositions or that an agreement existed between the Government —which took no position at Pinto's and Grimaldi's sentencings on the matter of their forfeiture obligations[14]—and Pinto and Grimaldi. *Cf. United States v. Molina*, 75 F.3d 600, 602 (10th Cir. 1996) (the Government's post-trial favorable treatment of witnesses "is not evidence that" agreements of such favorable treatment "were secretly reached prior to the

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[14] (*See* Apter Aff. at ¶ 22; Sklaire Aff. at ¶ 22)

witnesses' testimony and improperly withheld from the defense.").[15]

Moreover, even if an agreement had been made between the Government and the witnesses after trial and by the time of their sentencings that the escrowed $400,000 would satisfy Pinto's restitution and tax liabilities in addition to his forfeiture obligation, and that the Government would move to dismiss Grimaldi's forfeiture count, these agreements would post-date Mr. Ganim's trial, and therefore would not be *Giglio* material because no "promise to [a] witness" made *after* a witness's testimony can give rise to a *Giglio* violation. *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (emphasis added) (question of whether agreement "between the witness and the Government . . . was made *after or before* petitioner's trial . . . was dispositive" of the *Giglio* claim).

4. Materiality of Side Agreements and Escrow Agreement

Mr. Ganim's argument must also be rejected because even were there to have been agreements (which he has not shown)and even if the Government's failure to provide a copy of the Pinto Escrow Agreement constituted its suppression (which it does not), neither the side agreements nor the failure to produce the escrow agreement, independently or considered together, caused prejudice. Pinto and Grimaldi were extensively examined and

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[15] Mr. Ganim's assertion that the Government improperly permitted Pinto and Grimaldi to testify falsely as to the nonexistence of side deals thus lacks merit.

cross-examined about the terms of their plea agreements, and each described multiple times the context in which they were testifying against Petitioner as well as the substantial benefits, including financial benefits, they were to receive from the Government. Each testified that under his plea agreement he was liable for only a small fraction of the total financial liability (in fines, restitution, and forfeiture) the Government could have sought to have imposed on him if he stood trial, and that in exchange for his cooperation the Government agreed to consider asking the Court to reduce the prison sentence he was otherwise facing on the charges to which he had pleaded guilty. Moreover, each testified about the financial consequences of the penalties for the crimes to which he had pleaded guilty. They both testified that to satisfy their financial obligations they sold their real property holdings. Pinto testified that he was left with almost no assets: after selling the Fairfield Beach Road and Burrwood Common properties, he told the jury, he had almost nothing left except a house in his wife's name, on which the Government had placed a lien. Grimaldi testified that he had to sell his own home to satisfy his $175,000 obligation. Each testified that if he testified falsely the Government could prosecute him for perjury. Pinto's and Grimaldi's testimony regarding the lenient treatment they stood to receive from the Government in exchange for their testimony, as well as the contingent nature of that leniency, revealed an extensively negotiated relationship between the Government and each witness. In this context, the additional fact that the sums to which each had testified would satisfy the *entirety* of their financial obligations, and not just their forfeiture obligations, would have been, at most, "cumulative of equally

impeaching evidence introduced at trial," and thus "not material." *United States v. Spinelli*, 551 F.3d 159, 165 (2d Cir. 2008) (*citing United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998)). Thus, Mr. Ganim could not meet "this stringent materiality standard," *id.*, and his claim under *Brady* and *Giglio* must be rejected.

B. Pinto's Psychiatric Treatment

Based on a reference in Pinto's sentencing memorandum to a psychiatrist's report offered in aid of sentencing, Mr. Ganim concludes that Pinto underwent psychiatric treatment before or at the time of his trial, and that this undisclosed impeachment evidence constitutes a *Brady* violation. In advance of his sentencing hearing Pinto argued:

> As was noted by Dr. [David] Preven in his report, "Mr. Pinto was dazzled by Mr. Ganim's intelligence, energy and commitment to his goals." He was dazzled by Mr. Ganim's taste for fine clothes, fine wine, and expensive lifestyle. Whether it was his youth, his vulnerability, or the fact that he was simply seduced by power and money, Pinto set off on an odyssey with Ganim and others that was to take him down a road of criminality the extent of which he failed to appreciate until it was too late.

(Pinto's Prelim. Sentencing Mem., Ex. 20, at 15.)

This report constitutes no evidence that Pinto had seen a psychiatrist before or during Mr. Ganim's trial. Not only did Pinto state to the Court at his guilty plea colloquy on June 13, 2001 that he was not and had not recently been "under the care of any physician or

psychiatrist" (Ex. T at 8), but his counsel avers that Pinto "was not under the care of a psychiatrist at the time of the trial in *United States v. Ganim*," and in fact "has never been under the care of a psychiatrist" (Ex. 12 at ¶ 16). Pinto's counsel further avers that "[i]n preparation for [Pinto's] sentencing, [counsel] asked that [Pinto] be evaluated by Dr. David Preven, a psychiatrist," who "interviewed Mr. Pinto and produced a report, dated April 30, 2003." (*Id.* at ¶ 17.) Further, because the report itself did not exist until after Mr. Ganim's trial, the Government obviously could not have turned it over before or during that trial, and thus the psychiatric evaluation it contained is not information that may form the basis of a *Brady* or *Giglio* claim. *See, e.g., United States v. Sanchez*, 251 F.3d 598, 603 (7th Cir. 2001) (rejecting claim that Government violated *Brady* by failing to disclose information that did not exist at the time of the petitioner's trial, and explaining that "because the [G]overnment cannot suppress evidence that does not exist at the time of the trial, there is no *Brady* violation").[16]

C. Government's Investigation of Theresa Supple

Theresa Supple, a supervising project manager employed by the Connecticut Department of Public

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[16] Mr. Ganim's reliance on *Leka v. Portuondo*, in which the Second Circuit observed that "*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward," 257 F.3d 89, 100 (2d Cir. 2001), is misplaced because the Government cannot violate the Due Process Clause by failing to disclose information that does not actually exist at the time of trial, see *DeMarco*, 415 U.S. at 450; *Sanchez*, 251 F.3d at 603.

Works ("DPW"), testified for the Government at Mr. Ganim's trial about the plans of the State of Connecticut and City of Bridgeport to exercise their eminent domain authority to "condemn property owned by B.C. Sand & Gravel [("B&C")] in order to build a juvenile detention facility." *Ganim*, 510 F.3d at 139 (recounting facts). Mr. Ganim claims that federal authorities had been investigating corruption in the DPW at the time of the Ganim trial, and that "Supple was a key witness, if not a potential target, of [the Government's] investigation" (Pet'r's Mem. Supp. at 23, 52–53), quoting a May 2003 newspaper report of Supple's suicide stating that "'[s]tate and federal authorities said Supple could have provided valuable assistance to the FBI by giving them a road map to how the contracts. were awarded in'" two projects, including the one in Bridgeport (*id.* (quoting newspaper article (Ex. U))). Mr. Ganim concludes that "Supple's role in the . . . investigation" was impeachment evidence because it shows that she "would be highly motivated to testify favorably for the Government at [P]etitioner's trial," and was therefore "*Brady* material that should have been disclosed to [P]etitioner." (*Id.*)

Mr. Ganim's argument is unavailing because Supple was in fact a relatively minor witness in Ganim's trial whose testimony did not link him to any criminal conduct, and was in any event corroborated by the testimony of B&C principal Kenneth Burns. Therefore, even assuming Supple had a role in the Government's investigation of DPW that predated the conclusion of Mr. Ganim's trial, the Government's failure to disclose that role was not material.

Supple testified that in early 1999 Mr. Ganim was in favor of exercising eminent domain over the B&C property, so the State let the City "step[] forward" on the project. (Trial Tr. at 6608.) At a well-attended April 1999 meeting, however, public opposition to the project was "vehement[]," [17] and in May 1999 Supple learned that Mr. Ganim had decided to have the City "ceas[e] the acquisition or the eminent domain proceedings" because condemning the property would harm Bridgeport businesses (*id.* at 6612, 6614, 6681, 6683 (protection of businesses was Mr. Ganim's only stated rationale for opposing acquisition of B&C property)), and thereafter the State and the City "effectively reversed roles," with the State now taking the lead on the eminent domain proceedings (*id.* at 6616). After further negotiation, Supple testified, the State agreed "to look elsewhere as a possible site for the juvenile detention center," with Mr. Ganim's opposition to the B&C site "an important factor" in the State's decision because of the fact that the center's construction plan had contemplated a City-State partnership. (*Id.* at 6625; *see also id.* at 6626, 6660–61 (Supple testifying that State would not acquire property if City opposed acquisition).) Supple testified that the City and State agreed in September 1999 to use their eminent domain authority to acquire a parcel adjacent to the B&C property housing "an empty building" rather than the property containing businesses including B&C. (*Id.* at 6667.)

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[17] (Trial Tr. at 6612, 6614, 6644–46 (describing public opposition on cross examination); *id.* at 6655–57 (describing correspondence between State and B&C on cross examination); *id.* at 6664 (testifying that public opposition was a subject of discussion among State and City officials at September 1999 meeting).)

But it was B&C principal Kenneth Burns, not Supple, who testified that he paid Pinto $100,000 for Mr. Ganim to oppose the acquisition. Burns testified regarding the dates and substance of the meetings throughout 1999, his relationship and fee arrangement with Pinto, his knowledge of Pinto's "close" relationship with Mr. Ganim, and his crediting Pinto with State and City decisions to locate the juvenile detention center on a different site. (*Id.* at 6242–61, 6266–68, 6275–80.) After the City and State agreed to acquire a different parcel, B&C paid Pinto the $100,000, which Pinto shared with Ganim. *See generally Ganim*, 510 F.3d at 139–40 (describing this arrangement).

Because Supple did not testify as to any arrangements, illegal or otherwise, that Mr. Ganim had with Pinto or B&C—indeed, she testified that she had never met or dealt with Pinto—and because Burns both corroborated the facts to which Supple testified and also provided the testimony supporting a conclusion that Mr. Ganim opposed condemnation of the B&C property in exchange for sums paid by B&C to Pinto, Supple's testimony was of no critical "importance" to Mr. Ganim's conviction, and was in any event corroborated by Burns. Supple did not provide *any*" evidence linking the defendant[]to the crime," let alone the "only" such evidence. *See Spinelli*, 551 F.3d at 165. Therefore, even assuming there was, at the time of Mr. Ganim's trial, "undisclosed information which could have served to impeach" Supple, Mr. Ganim has failed to support the possibility that Supple's role in the DPW investigation—even assuming it predated the end of his criminal

trial[18]—could meet the "stringent materiality standard" of *Brady* and its progeny. *Id.*

D. Summary

Mr. Ganim's assertions that his conviction at trial was obtained in violation of *Brady* and *Giglio*—by virtue of (1) the Government's failure to produce a copy of the Pinto Escrow Agreement; (2) his unsupported speculation that secret side deals existed between the Government and each of its two key witnesses that the Government failed to disclose them; (3) his unsupported speculation that Pinto was under undisclosed psychiatric care before or during his trial; and (4) his position that the Government's investigation of a minor witness should have been disclosed—must be rejected because they present no

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[18] In a sur-reply the Government contends that this information did not exist at the time of Mr. Ganim's trial because "the Government first became aware of allegations involving Supple through an attorney proffer on March 21, 2003, two days after the jury returned its verdict in the Ganim case." (Gov't Sur-Reply [Doc. # 18] at 2.) Petitioner has moved to strike the sur-reply because "the Government did not notify [P]etitioner or seek counsel's consent," and instead filed the sur-reply "without leave of the Court." (Pet'r's Mot. Strike [Doc. # 20] at 2.) The Government counters that its sur-reply does "not change [its] position on Ganim's claim[s]," but only "clarif[ies] the record." (Gov't Reply [Doc. # 21] at 1, 3.) The Court's publicly available Chambers Practices expressly state that sur-replies are "not usually allow[ed]." The Court did not give the Government leave to file a sur-reply, and the Government cites no authority for the proposition that reiteration of a position and clarification of a record provide grounds to file a sur-reply absent leave of the Court. Petitioner's Motion to Strike the Sur-reply will be granted, and the Court does not rely on the sur-reply in considering Mr. Ganim's petition.

merit. The Pinto Escrow Agreement was not suppressed, the secret side deals did not exist, and Pinto was not under psychiatric care before or during Petitioner's trial; and even "considered collectively," see *Kyles*, 514 U.S. at 436, the agreement, side deals, fact of Pinto's psychiatric care, and undisclosed investigation of Supple fail "to undermine confidence in the verdict," *Youngblood*, 547 U.S. at 870 (internal quotations omitted), that Mr. Ganim was guilty of the seven crimes of which he was convicted.

IV. Conclusion

For the reasons stated above, Petitioner's Motion to Strike the Government's Sur-Reply [Doc. # 20] is GRANTED, and Petitioner's Motion to Vacate, Set Aside, or Correct Sentence [Doc. # 1] is DENIED. The Clerk is directed to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 30th day of December, 2009.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:08cv1759 (JBA)
Criminal No. 3:01cr263 (JBA)

[Filed January 29, 2010]

Joseph P. Ganim,	)
Petitioner,	)
	)
v.	)
	)
United States of America,	)
Respondent.	)
	)

ORDER

A petitioner may not appeal a "final order in a proceeding under [28 U.S.C. §] 2255" unless a "judge issues a certificate of appealability," 28 U.S.C. § 2253(c)(1)(B), which "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2). "The standard for issuing the certificate of appealability is whether 'jurists of reason would find it debatable whether the petition states a valid claim.'" *Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) (quoting *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)).

Petitioner Joseph P. Ganim moves for a certificate of appealability of this Court's denial of his petition under § 2255 as to "the issue of whether the Government violated *Brady* and *Giglio* when it failed to disclose the significant financial benefits that were given to Pinto and Grimaldi." (Pet'r's Mot. at 4–5.) He argues that "he has made the required showing that jurists of reason would find it debatable whether the Government's actions in altering the terms of two cooperation agreements to give witnesses hundreds of thousands of dollars in undisclosed benefits violated [P]etitioner's constitutional rights and circumvented the requirements set forth in *Brady*, *Giglio* and their progeny." (*Id.* at 4.)

As the Court explained in denying Mr. Ganim's § 2255 petition, his claims under *Brady* and *Giglio* failed not only because he failed as an initial matter to establish the existence of any secret agreement or side deal at the time of his trial to alter the terms of Pinto's and Grimaldi's cooperation agreements, but also because he did not demonstrate the second or third of the "three components of a true *Brady* violation," that is, that exculpatory or witness-impeaching evidence was "suppressed by the [prosecution], either willfully or inadvertently," or that "prejudice . . . ensued." *United States v. Douglas*, 525 F.3d 225, 244–45 (2d Cir. 2008). First, he based his surmise of the secret side deal with Pinto in part on an escrow agreement, but that agreement was not suppressed. Second, even if the side deals existed and had been suppressed, their suppression did not cause prejudice because, in light of the cross-examination of Pinto and Grimaldi regarding the Government's leniency in exchange for their cooperation, the side deals "would have been, at most, 'cumulative of equally impeaching evidence

introduced at trial,' and thus 'not material.'" (Order denying Petition [Doc. # 22] at 17 (quoting *United States v. Spinelli*, 551 F.3d 159, 165 (2d Cir. 2008)); *see generally id.* at 4–17.) The Court thus concluded that Mr. Ganim's *Brady* and *Giglio* claims lacked merit for three reasons: he did not show the existence of the evidence; he did not show its suppression; and he did not show its materiality.

For these reasons, "jurists of reason" would agree that Mr. Ganim has not "state[d] a valid claim" that his constitutional rights under *Brady* and *Giglio* were violated. Petitioner's Motion for Certificate of Appealability [Doc. # 24] is therefore DENIED.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 28th day of January, 2010.

APPENDIX D

—Original Message—
From: Apter, Ron
Sent: Wednesday, August 08, 2001 3:38 PM
To: Turbert, Julie
Cc: Hughes, John; Sklaire, Mike
Subject: RE: Sample Lis Pendens

Julie: We recently placed a lis pendens on property belonging to Paul J. Pinto located at 963 Fairfield Beach Road in Fairfield, CT. Pinto has a contract to sell the property, with the closing scheduled for the next week or so. It is my understanding that Pinto cannot obtain the required title insurance unless and until the lis pendens is released. I do not oppose doing so because, pursuant to an escrow agreement between Pinto and the govt, the proceeds from the sale are to be placed into the District Court registry, and following the disposition of the criminal case, will be used to pay restitution to the victims, etc. It seems to me that there are two ways to accomplish the desired transfer of the funds to the Court registry: 1) send someone to the closing and have a check for the sale proceeds cut to the government, or 2) have Attorney Pickerstein accept the proceeds from the sale, and then deposit the funds with the Court. Your comments, and your assistance in releasing the encumbrance, are greatly appreciated: Thx. Ron

Apter, Ron

To: Turbert, Julie
Subject: PP/LG Forfeiture

Jules:

To date Grimaldi has remitted $150,000 in proceeds from the sale of 22 Hopewell Wood Rd, and $25,000 in proceeds from an Advest money market account, for a total of $175,000, in satisfaction of his criminal forfeiture obligations to which he pleaded guilty.
The money was deposited in the District Court's registry in an interest bearing account pending the disposition of Grimaldi's criminal case.

Pinto has remitted $229,253.33 in proceeds from the sale of 963 Fairfield Beach Rd. (He still owes an additional $23,335 in proceeds from that sale). He has also turned over an additional $133,000, which he obtained by liquidating a Prudential securities acct., a Prudential IRA-SEP acct., and a Kasper Group 401(k) acct., for a total of $362,253.33. The money was also placed in the D.Ct's registry pending the outcome of Pinto's criminal case. Per agreement of the parties, the funds may be used to satisfy Pinto's restitution obligations if so ordered by the Court.

APPENDIX E

U.S. Department of Justice

[SEAL] **FILE COPY**

United States Attorney
District of Connecticut

Abraham A. Ribicoff Federal Building (860) 947-1101
450 Main Street, Room 328
Hartford, Connecticut 06103 Fax (860) 240-3291

November 30, 2001

Harold James Pickerstein, Esq.
Pepe & Hazard
30 Jelliff Lane
Southport, Connecticut 06490

RE: Kasper Group v. City of Bridgeport

Dear Jim:

Enclosed for your review, please find a copy of the July 10, 2001 letter that I sent to Attorney Craig Raabe regarding the above-captioned matter.

Very truly yours,

JOHN A. DANAHER III
UNITED STATES ATTORNEY

/s/ Ronald S. Apter

RONALD S. APTER
SUPERVISORY ASSISTANT
UNITED STATES ATTORNEY

cc: Craig A. Raabe, Esq.

U.S. Department of Justice

[SEAL]

United States Attorney
District of Connecticut

Abraham A. Ribicoff Federal Building (860) 947-1101
450 Main Street, Room 328
Hartford, Connecticut 06103 Fax (860) 240-3291

July 10, 2001

Craig A. Raabe, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103

Re: City of Bridgeport

Dear Craig:

Following the guilty plea entered in June 2001 by Paul J. Pinto to federal racketeering charges, you called on behalf of your client, the City of Bridgeport, and informed me that the City was considering filing a civil lawsuit against Mr. Pinto, the Kasper Group, and perhaps others, to recoup monies the City may be owed as a consequence of illegal activities touching the governance of the City.

The United States Attorney's Office shares the view that those whose actions may have negatively impacted the City of Bridgeport should be stripped of any profits or gains realized as a result of their illegal actions in paying or accepting bribes and kickbacks.

For that reason, a condition of Mr. Pinto's guilty plea was that he will be required to make restitution to all victims of his criminal conduct, including the City of Bridgeport. To that end, Mr. Pinto has agreed to forfeit approximately $400,000 in assets that may be used to accomplish this purpose. The Government intends to seek similar restitution agreements in connection with any guilty pleas that may be entered in the future and to vigorously pursue restitution orders in connection with any prosecutions that may be brought.

With respect to the City's contemplated civil lawsuit to recoup losses suffered by its citizens as a result of municipal corruption, we would ask that such a lawsuit await the conclusion of the federal criminal investigation to the extent that doing so will not compromise the City's interests in any way.

Thank you for consideration of our views in connection with this matter, and please feel free to contact me if you have any questions regarding this matter.

Very truly yours,

JOHN A. DANAHER III
UNITED STATES ATTORNEY

/s/ Ronald S. Apter

RONALD S. APTER
SUPERVISORY ASSISTANT
UNITED STATES ATTORNEY

APPENDIX F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255.

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding

instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C § 2253.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

18 U.S.C. § 1962.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

U.S. Constitution - Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution - Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.